(3)

No. 87-603

Supreme Court, U.S.
FILED
NOV 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Theresa Miera, et al.,
Petitioners,

v.

Teresa Garcia, a minor, by her next friends Max and Sandra Garcia,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703)838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

35pp

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... 2

INTEREST OF AMICUS CURIAE..... 2

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 4

I. The law is not "clearly established" so as to prevent the grant of qualified immunity to public school officials, where two courts of appeals are in direct conflict..... 4

II. The openness of the public schools and the availability of state law remedies preclude federal judicial scrutiny of individual incidents of allegedly excessive public school corporal punishment under a substantive due process standard..... 6

A. In a civil setting, this Court has applied substantive due process only in cases involving challenges to statutes or policies..... 6

B. The decision below fails to take into account

state tort remedies.....10

C. Substantive due process in the context of the public schools should be treated differently than in the criminal context..... 13

D. The lower court's interpretation of substantive due process expands jurisdiction of the federal courts over any decision that could raise a "liberty" interest for purpose of procedural due process.. 16

E. Notwithstanding Ingraham v. Wright and Daniels v. Williams, plaintiffs continue to file cases involving "excessive" or unreasonable discipline in the federal courts... 21

CONCLUSION..... 26

TABLE OF AUTHORITIES

CASES: PAGE

Anderson v. Creighton, 107 S.Ct. 3034 (1987).....4, 5, 6

Aptheker v. Secretary of State, 378 U.S. 497 (1954)..... 7

Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978)..... 21

Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982)..8, 17, 21

Brooks v. School Board of the City of Richmond, 569 F. Supp. 1534 (E.D. Va. 1983)..... 23

D.T. et al. v. Epps and Independent School District No. 16 of Pawnee County, Oklahoma, C.A. 85-C-206 E (jury verdict, N.D.Ok. Oct. 23, 1987)..... 24

Daniels v. Williams, 106 S. Ct. 662 (1986).....12, 13, 21, 23

De Falco v. Deer Lake School District, 663 F. Supp. 1108 (W.D. Pa. 1987)..... 23

Des Moines Independent School District v. Tinker, 393 U.S. 503 (1969).....17

Dickens v. Johnson County Board of Education, 661 F.Supp. 155 (E.D. Tenn. 1987)..... 23

Fraser v. Bethel School District,

755 F.2d 1356 (9th Cir. 1985), rev'd, 106 S.Ct. 3159 (1986)..... 17

Goss v. Lopez, 419 U.S. 565 (1975).... 18

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 7

Hale v. Pringle, 562 F. Supp. 598 (M.D. Al. 1983)..... 23

Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).....11, 22

Ingraham v. Wright, 430 U.S. 651 (1977)..... passim

Malley v. Briggs, 106 S.Ct. 1092..... 5

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 7

Myre v. Board of Education of Seneca Township High School District No. 160, 439 N.E.2d 74 (App.Ct Ill. 1982)..... 23

Petrey v. Flaugher, 505 F.Supp. 1087 (E.D. Ky. 1981)..... 23

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 7

Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985)..... 8

Rhodus V. Dumiller, 552 F.Supp. 425 (M.D. La. 1982)..... 23

Rochin v. California, 342 U.S. 165 (1952)..... 14

State in Interest of T.L.O., 463 A.2d

934,rev'd, 469 U.S. 325 (1985).....16, 17

Wood v. Strickland, 420 U.S. 315 (1975).....7, 8, 15, 17, 21

OTHER AUTHORITIES:

"Corporal Punishment in America's Schools" Rodale's Children's Magazine (Rodale Press, Inc., Emmaus,Pa. 1987) 25

No. 87-603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Theresa Miera, et al.,
Petitioners,

v.

Teresa Garcia, a minor, by her next friends Max and Sandra Garcia,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

Both parties have consented to the filing of this brief. The consent is on

file with the clerk.

QUESTIONS PRESENTED

1. Whether the law is "clearly established" so as to prevent the grant of qualified immunity to public school officials, where two courts of appeals are in direct conflict?

2. Whether the openness of the public schools and the availability of state law remedies preclude federal judicial scrutiny of individual incidents of allegedly excessive public school corporal punishment under a substantive due process standard?

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the

Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational and discipline standards of the public schools.

The subject of school discipline is of vital concern to school boards across the country. Although not all school boards are authorized under state law to use corporal punishment as a disciplinary tool, all school boards are concerned that

decisions such as that of the Court of Appeals for the Tenth Circuit will seriously undermine their ability to enforce school rules and impose disciplinary sanctions in a reasonable manner, taking into account local exigencies.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

I. THE LAW IS NOT "CLEARLY ESTABLISHED" SO AS TO PREVENT THE GRANT OF QUALIFIED IMMUNITY TO PUBLIC SCHOOL OFFICIALS, WHERE TWO COURTS OF APPEALS ARE IN DIRECT CONFLICT.

Coming only three weeks after this Court's comprehensive decision in Anderson v. Creighton, 107 S.Ct. 3034 (1987), the decision of the Court of Appeals for the Tenth Circuit denying qualified immunity

to the Penasco School District officials and teachers seems a particularly puzzling rejection of this vital doctrine.

School officials and teachers are daily called on to make numerous split-second decisions in murky areas of law concerning the welfare of students and the maintenance of discipline. To hold them accountable, as the Tenth Circuit has done, where a direct conflict exists among the appellate circuits cannot but have a chilling effect on their willingness to act with dispatch in critical educational decisions. They need the protection of this defense as much as did the police officials in Malley v. Briggs, 106 S.Ct. 1092 and the Federal Bureau of Investigation agent in Anderson v. Creighton, supra.

As Petitioners observe (Petition, 12, n. 3), it is not at all clear whether the

Court of Appeals for the Tenth Circuit actually considered the impact of Anderson v. Creighton.

II. THE OPENNESS OF THE PUBLIC SCHOOLS AND THE AVAILABILITY OF STATE LAW REMEDIES PRECLUDE FEDERAL JUDICIAL SCRUTINY OF INDIVIDUAL INCIDENTS OF ALLEGEDLY EXCESSIVE PUBLIC SCHOOL CORPORAL PUNISHMENT UNDER A SUBSTANTIVE DUE PROCESS STANDARD.

A. In a civil setting, this Court has applied substantive due process only in cases involving challenges to statutes or policies.

Traditionally this Court has been temperate in its use of "substantive due process" to overturn a state policy. In each case, the Court has found an overriding federal interest in protecting a "right" which the state has chosen through written policy to trammel. In each case, the state has made a conscious choice, incorporated in a statute or a local policy, which in some way restricts that "right."

Under the rubric of "substantive due process," the Court has overturned statutes interfering with the right of privacy (use of contraceptives), Griswold v. Connecticut, 381 U.S. 479 (1965); the right to educate one's children in the school of one's choosing, Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right to study a foreign language, Meyer v. Nebraska, 262 U.S. 390 (1923); the right to travel, Aptheker v. Secretary of State, 378 U.S. 497 (1954). In all of these cases the Court had before it a state or federal statute which on its face abridged the free exercise of a "fundamental right."

Where actions to implement a policy are challenged, this Court has not been eager to find substantive due process implications. In Wood v. Strickland, 420 U.S. 315 (1975), the court of appeals

found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court vacated the judgment, holding "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." Id. at 326.

In 1982, in a per curiam opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own policy judgment for that of the school board. Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

In a concurring opinion in Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985), Justice Powell stated that it was unnecessary for the Court to assume

the existence of a substantive due process right to be free from arbitrary dismissal from a medical program.

> "While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution... substantive due process rights are created only by the Constitution...The history of substantive due process 'counsels caution and restraint.' Moore v. City of East Cleveland, 431 U.S. 494 (1977)...Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.' [Citing Poe v. Ullman, 367 U.S. 497 (1961]." Id. at 515.

The case at bar differs from the traditional civil substantive due process case which challenges a statute or policy as unconstitutional. Here, there is no allegation that either a state statute or a local school board policy authorizes the use of "excessive" or "unreasonable"

physical force in punishing students. (Not only is excessive punishment not authorized by statute, it is prohibited.) Respondents take issue with action of the Petitioners - not the policy - a circumstance where the application of substantive due process is at best questionable.

B. The decision below fails to take into account state tort remedies.

This Court in Ingraham v. Wright, 430 U.S. 651 (1977), held that the Eighth Amendment's proscription against cruel and unusual punishment does not apply to school corporal punishment. As to the issue of procedural due process the Court held that, although "corporal punishment in public schools implicates a constitutionally protected liberty interest...the traditional common-law remedies are fully adequate to afford due

process."

The Petitioners in Ingraham also raised the question of substantive due process: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?" The Court expressly refused to address that question. 430 U.S. at 658 n.12, 679 n.47.

This Court's decision not to address this issue left standing a determination by the Court of Appeals for the Fifth Circuit that excessive corporal punishment at any level did not implicate a substantive due process cause of action. Subsequently, the Fourth Circuit in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), and now the Tenth Circuit have disagreed.

This conflict among three circuits begs for resolution.

If is difficult to understand how both procedural and substantive due process can be implicated in a case alleging excessive corporal punishment. Under Ingraham, a plaintiff may be afforded procedural due process only through resort to state tort remedies, after the corporal punishment has been imposed. Could the plaintiff, after obtaining a judgment in state court, then seek damages in federal court for the denial of substantive due process rights?

In 1986 the Court ruled in Daniels v. Williams, 106 S.Ct. 662 (1986), that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property," even in the context of a prison where the

openness of the public schools is not present.

One may attempt to distinguish Daniels from this case on the basis that corporal punishment is an intentional act. But, Respondents do not complain of the imposition of corporal punishment per se. Their complaint is based on the imposition of excessive corporal punishment. That excess, if any, arises out of an act of negligence. It would seem that the rule of law in Daniels should apply here as well.

C. Substantive due process in the context of the public schools should be treated differently than in the criminal context.

Amicus submits that substantive due process standards should not be transplanted by the courts from the criminal enforcement context into the classroom as both the Fourth and Tenth

Circuits have done. As this Court noted in Ingraham v. Wright, supra at 670:

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Prisoners are not in the position to file criminal assault charges because the complaints would have to be filed with the very officials who have committed the offense. In those cases there is no reasonable way to obtain "due process" from the state and the injured party must resort to the federal courts.

The court of appeals below cites Rochin v. California, 342 U.S. 1645 (1952), for the proposition that substantive due process applies in any case where the actions of a public official "shock the conscience." Unlike a prisoner, however, students and their

parents have access to the criminal justice system to assure that public school officials do not abuse their disciplinary powers to the extent of "shocking the conscience."

It is difficult to understand why a state's tort laws are sufficient to afford procedural due process even though instituted after a constitutionally protected "liberty" interest is infringed, Wood v. Strickland, supra, - but are insufficient to remedy an infringement of a "fundamental right" for the purpose of affording substantive due process. These legal bright lines lead public officials to cease disciplinary actions altogether rather than face a federal lawsuit. Perhaps that is the end some federal courts are seeking, but one wonders if that is an appropriate end.

D. The lower court's interpretation of substantive due process expands jurisdiction of the federal courts over any decision that could raise a "liberty" interest for purpose of procedural due process.

The court of appeals reasons in its decision below that where a liberty interest exists to support a procedural due process claim, that automatically raises a substantive due process claim as well. Although the case at bar relates only to corporal punishment, the court of appeals' theory could apply to any action of a school official. If students can make a "federal case" out of every action by a school official by alleging that their substantive due process rights have been violated, that will make school discipline extremely difficult to administer.

Unfortunately, some lower federal courts have been responsive to attempts to

make a constitutional claim out of policy disagreement. They have ruled that the First Amendment bars a school from "using its own white middle class morality" in adopting rules of decorum. Fraser v. Bethel School District, 755 F.2d 1356 (9th Cir. 1985), rev'd 106 S.Ct. 3159 (1986). They have ruled that the Fourth Amendment bars a school district from enforcing school rules. State in Interest of T.L.O., 463 A.2d 934, rev'd 469 U.S. 325 (1985). They have viewed the Due Process Clause as barring a school district from interpreting its own rules. Wood v. Strickland, McCluskey, supra.

In Des Moines Independent School District v. Tinker, 393 U.S. 503 (1969), Fraser, T.L.O. and Ingraham, this Court has noted that the First Amendment, Fourth Amendment and Eighth Amendment rights of students in the context of the public

schools should be analyzed differently than in a criminal or other law enforcement context. Similarly, the Court has ruled that what constitutes procedural due process in the context of the public schools is different than in a court of law or other context outside the school. Goss v. Lopez, 419 U.S. 565 (1975).

The parameters of the constitutional "catchall" - substantive due process - in the context of the public schools remains unclear. Presently it is used by litigants to challenge any public policy or practice with which they do not agree.

The court of appeals below opines that it is required by Ingraham "to hold that, at some point, excessive corporal punishment violates the pupil's substantive due process rights." Petition for Writ of Certiorari at page A-5. The court quotes Ingraham to the effect that

"where school authorities...punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold at the Fourteenth Amendment liberty interests are implicated." Id. at A-5, citing, Ingraham, 430 U.S. at 674. The court then reaches the non sequitor that "[t]his language plainly indicates that the infliction of corporal punishment can affect a fundamental right susceptible to substantive due process protection." Id.

Under the lower court's rationale, a "fundamental right" for purposes of substantive due process, is coterminus with a "liberty" or "property" interest for purposes of procedural due process. If that is true, then the substance of any action of a public school official that affects a liberty or property interest of a student, employee or taxpayer is open to

scrutiny by the federal courts. The courts could be called upon to determine not only whether the school officials provided procedural due process in taking certain action, but the court will also decide whether the action itself was correct. Should a school be closed? Should a dress code be instituted? Should the school offer an AIDS education program? Is a ten day suspension for a drug offense too long?

It is questionable that the Framers of the Constitution, devoted as they were to grassroots control of local matters such as education, intended to empower the federal courts to second-guess the decisions of local school officials in every manner of activity, where the action does not raise an explicit constitutional entitlement such as free speech or equal protection.

This Court has been reluctant to announce a position on the question of the breadth of substantive due process in the schools. This Court has been understandably cautious in declining to review public school academic and disciplinary decisions outside the corporal punishment area under a substantive due process analysis, e.g. Wood v. Strickland, supra; Board of Education of Rogers, Arkansas v. McCluskey, supra; Board of Curators Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978).

But as long as the Court has not spoken, lower federal courts will continue their attempts to solve every perceived wrong.

E. Notwithstanding Ingraham v. Wright and Daniels v. Williams, plaintiffs continue to file cases involving "excessive" or unreasonable discipline in the federal courts.

Amicus has no policy on the subject of corporal punishment, either endorsing or opposing its use. That is because opinions of school boards across the country vary on the subject. But the question before the federal courts should not be whether the use of corporal punishment is good or bad. The question is whether an allegation of "excessive" or "unreasonable" use of corporal punishment implicates substantive due process.

Although this Court's decision in Ingraham v. Wright precludes suits under the Eighth Amendment and holds that state tort remedies satisfy procedural due process, plaintiffs continue to allege substantive due process violations in their challenges to school disciplinary measures. See, e.g., Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (corporal

punishment); Hale v. Pringle, 562 F.Supp. 598 (M.D. Al., 1983) (corporal punishment); Brooks v. School Board of the City of Richmond, 569 F.Supp. 1534 (E.D. Va. 1983); (corporal punishment); Dickens v. Johnson County, 661 F.Supp. 155 (E.D. Tenn. 1987); (punishment "grossly disproportionate" to offense); De Falco v. Deer Lake School District, 663 F.Supp. 1108 (W.D. Pa. 1987) (deprivation of medical attention); Petrey v. Flaugher, 505 F.Supp. 1087 (E.D. Ky. 1981) (expulsion as excessive discipline); Rhodus v. Dumiller, 552 F.Supp. 425 (M.D. La. 1982) (corporal punishment); Myre v. Board of Education of Seneca Township High School District No. 160, 439 N.E.2d 74 (App. Ct Ill. 1982) (in-school suspension).

Even after Daniels v. Williams, plaintiffs continue their attempts to make

a federal case out of claims that are nothing more than common law torts. For example, in a recent case in Oklahoma plaintiffs were allowed to go to a jury and recover $134,000 in damages on a Section 1983 claim against the school district, charging "inadequate training, supervision and personnel investigative procedures" in the hiring and supervision of a teacher/coach who sexually abused three students. Complaint, D.T. et al. v. Epps and Independent School District No. 16 of Pawnee County, Oklahoma, C.A. 85-C-206 E (jury verdict, N.D. Ok. October 23, 1987). However heinous the conduct of the teacher, it is unclear as to how such facts present a federal constitutional question.

It requires no gift of prophecy to anticipate that, if the decision of the court of appeals is left undisturbed,

litigants will frame their substantive challenges to school disciplinary and policy decisions with sufficiently florid allegations to survive a motion to dismiss, embroiling the federal courts in numerous disputes that should have remained in the state court system. It is doubtful that the Framers of the Constitution intended to make every state action subject to federal court scrutiny merely through the mechanism of clever pleading.

According to the report of the Rodale Press, there are as many as two million incidents a year where students are physically disciplined, "Corporal Punishment in America's Schools" Rodale's Children's Magazine at 5 (Rodale Press, Inc., Emmaus, Pa. 1987). Given the continued wide use of corporal punishment across the country, cases such as the one

at bar are likely to increase. The lower courts need guidance from this Court as to whether an allegation of excessive corporal punishment implicates constitutional protections and, if so, whether the federal courts should look to the states to determine what is "reasonable" or develop their own standards.

CONCLUSION

Over the years this Court has expanded coverage under substantive due process so as to protect fundamental rights where the state provides no adequate remedy. Thus, most if not all substantive due process cases relate either to state treatment of criminals, who are not in a position to take advantage of state legal protections, or to state or local statutes, ordinances or codes which, on their face, implicate

fundamental rights. Neither of those situations exists here.

The Court has not ruled on the question of whether federal courts should intervene in decisions by local officials, such as public school officials, who have allegedly abused their authority under state law and where there is an adequate state remedy for such abuse.

Since important policy considerations are at issue here involving not only school discipline, but also the implementation of policy in a variety of other respects, Amicus urges the Court to review this important question.

Respectfully submitted,

Gwendolyn H. Gregory
NSBA Deputy General Counsel
Counsel of Record

August W. Steinhilber
NSBA General Counsel

Thomas A. Shannon
NSBA Executive Director

1680 Duke Street
Alexandria, VA 22314
838-6722